

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON
2 FOR THE COUNTY OF MULTNOMAH
3
4

5 THE ESTATE OF MICHELLE)
6 SCHWARZ, deceased, by and)
7 through her Personal)
8 Representative, RICHARD)
9 SCHWARZ,) Vol. 37-A
10)
11 Plaintiff,) Circuit Court
12 vs.) Case No. 0002-01376
13)
14)
15)
16)
17 PHILIP MORRIS INCORPORATED,)
18 a foreign corporation, and)
19 ROTHS I.G.A. FOODLINER,)
20 INCORPORATED, an Oregon)
21 corporation,)
22)
23 Defendants.)
24
25

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, That the
above-entitled matter came on regularly for Jury
Trial and was heard before the Honorable Roosevelt
Robinson, Judge of the Circuit Court of the County
of Multnomah, State of Oregon, commencing at 9:00
a.m., Monday, March 4, 2002.

* * *
Jennifer L. Wiles, CSR, RPR.
710 Multnomah County Courthouse
1021 SW Fourth Avenue
Portland, Oregon 97204

1 APPEARANCES:

2 Mr. D. Lawrence Wobbrock, Attorney at Law,
3 Mr. Charles S. Tauman, Attorney at Law,
4 Mr. Richard A. Lane, Attorney at Law,
5 Appearng on behalf of the Plaintiff;
6
7 Mr. James L. Dumas, Attorney at Law,
8 Mr. John W. Phillips, Attorney at Law,
9 Appearng on behalf of Defendant
10 Philip Morris, Incorporated and Defendant
11 Roths I.G.A. Foodliner, Incorporated;

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(March 4, 2002)

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A.M. PROCEEDINGS

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(Whereupon, the proceedings were reported, in Room 608, out of the presence of the jury, as follows:)

* * *

THE CLERK: All rise. Court is in session.

THE COURT: Good morning. And please be seated.

MR. PHILLIPS: Good morning, Your Honor.

THE COURT: Any matters for the Court before we bring the jury?

MR. TAUMAN: We have two, I guess, probably procedural or logistic matters that are quite important I think both to the Court to the jury and to the parties.

The first is witness scheduling. We learned last night that there were three casualties on the defendant's witness list. So now they are down to one, two, three, four, five, six remaining witnesses.

The reason I raise this is, first of all, to document it for the record. But also to

1 thank the defendants for notifying us of this
2 change and to, of course, encourage them to
3 continue to notify us of any changes.

4 The reason is, of course, that we are
5 preparing to cross-examine witnesses in the
6 order that they appear. And we may not have
7 the actual documents that we need or the
8 materials that we need for cross-examination,
9 if there's a last-minute change.

10 It's also a way of asking the Court's
11 indulgence, if that does happen, we may not,
12 things may not run as smoothly as everyone
13 would like.

14 And the third matter as far as scheduling
15 is because it appears that the defense case now
16 has been compressed, at least they, I think,
17 acknowledge by at least a day. We may have
18 some trouble scheduling our rebuttal witnesses,
19 which, of course, we don't even know who they
20 may be at this point because they would be in
21 response to evidence that comes in in the
22 defense.

23 So, I'm asking, A, to be seasonably
24 up-dated, which the defendants have been very
25 good at doing so far; and, B, probably in

1 advance, the Court's indulgence on the
2 scheduling of our rebuttal witnesses.

3 The second is probably of more concern.
4 And that is that I believe that we have been
5 operating on, as Your Honor put it, in our
6 case, in the old-fashioned way of dealing with
7 exhibits, and that is that you show them to
8 opposing counsel before you flash them up on
9 the board.

10 We would request that the same thing be
11 done in terms of demonstrative evidence. They
12 have a very nice PowerPoint program, and it is
13 real easy to then flash those up on the board.

14 And we would request that maybe there's a
15 way, Mr. Walsh is the master of the mixer,
16 maybe there's a way that they can appear, for
17 at least a few seconds on our screen, before
18 they go up in front of the jury.

19 THE COURT: Counsel, is that possible?
20 Like, if you are doing to do a, put something
21 on the screen, can you put it on the small
22 screen, say, 15 or 20 seconds before you put it
23 on the larger screen? Is that a possibility?

24 MR. PHILLIPS: Whatever you want, Your
25 Honor. I'll just make the observations that,

1 for demonstratives, we did ask that substantive
2 exhibits that Mr. Wobbrock or Mr. Tauman were
3 going to use would be shown to us in advance,
4 but the demonstratives were not in the
5 plaintiff's case. So that would be changing
6 the protocol.

7 So whatever the Court wants to do in that
8 regard.

9 THE COURT: If we have the technology to
10 do it, it doesn't seem to be a big problem. If
11 we have the technology to do that, let's just
12 do it, and then if they have some great
13 objection maybe that will slow us down some
14 more, but let's do it as how that works.

15 MR. PHILLIPS: Let me follow up on Mr.
16 Tauman's comments briefly.

17 Oh, I'm sorry.

18 MR. WOB BROCK: That last subject, Your
19 Honor, they have been providing us with the
20 hard copies of that, after they have finished
21 with the witnesses.

22 I think the simplest way would be to
23 provide us with those before they get started.
24 Then we wouldn't have to stop and look at the
25 screen.

1 Here's the reason I'm concerned about
2 this, Judge. Looking at prior testimony of
3 these witnesses, and most of them on both sides
4 have testified somewhere before, as the Court
5 has probably understood by now.

6 There's been a problem with at least a
7 couple of the witnesses starting to quote and
8 refer to hearsay documents. And it has
9 appeared that on occasion those hearsay
10 documents have even actually been printed out
11 or portions of them on these demonstratives and
12 then flashed up on the screen.

13 It doesn't seem to be appropriate, No. 1,
14 to do that, unless it is otherwise qualified
15 under the rules of evidence. And, No. 2, to
16 once get it up there, and then have me object
17 after the jury has seen it I think is improper,
18 also.

19 So, I think the best way is to just simply
20 give us these documents that they have, that
21 they have given us so far afterwards, because
22 the Court has announced these are all going
23 into evidence, and let us look at them, and
24 then we can move this along without having to
25 stop and ponder over the screen and the screen

1 resolution isn't all that great.

2 So, I ask this morning, if they have
3 demonstratives coming up with the next witness,
4 give them to us now in hard copy. Then we can
5 proceed. It will probably take two minutes to
6 look at them.

7 MR. PHILLIPS: Well, yeah, I mean
8 turnabout is fair play. And they showed us
9 their demonstratives when they have put them
10 on. They didn't give us package beforehand and
11 give us a chance to look at them before the
12 direct as well as before the cross-examination.

13 What we can do, Your Honor, and I think
14 what we are willing to do, consistent with what
15 you have just said, is to give them a hard copy
16 of a demonstrative as it is presented.

17 You know, an exam is a dynamic process.
18 Mr. Dumas, with the witness this morning, is
19 not going to use all of those demonstratives.
20 There's no reason to give the demonstrative to
21 counsel if Mr. Dumas elects not to use it in
22 the exam.

23 So, I just think they have got to be fair
24 and consistent with both sides.

25 And I appreciate Your Honor's suggestion

1 that if we have the technology and we have got
2 a hard copy we can get it to them before we do
3 that.

4 But it doesn't seem to be fair or at least
5 consistent with what the parties' obligations
6 have been and what their obligations were in
7 their opening case to require a disclosure
8 before the fact of all of the demonstrative
9 exhibits, some of which may be used, some of
10 which may not be used.

11 MR. WOBROCK: Judge, in that regard, I
12 think almost every demonstrative I have used,
13 for examples, if you could see those charts
14 over in the corner, those organizational
15 charts, those are already in evidence. They
16 are just blown up of what's in these boxes that
17 they didn't object to.

18 If there was any demonstrative that I
19 used, it was probably less than two or three
20 that hadn't been shown. That's point No. 1.

21 Point No. 2, the way I have understood
22 this process, as long as I have been a lawyer,
23 it is an adversarial process. If they had a
24 problem, they should have raised it. The
25 reason they didn't have a problem is it hasn't

1 come up.

2 The only demonstrative I think I may have
3 put on, that they hadn't seen, is probably the
4 picture of the family. That's it. The rest of
5 them are all in evidence.

6 And so I think it's -- the reason that
7 they didn't need to see them before is because
8 they had seen them before when we provided them
9 with all of the exhibits. So, I don't think
10 it's a different standard.

11 MR. PHILLIPS: Well, I think it is, Your
12 Honor. He made a number of demonstratives in
13 front of the jury, and I didn't tell him to
14 secrete that, those demonstratives, and not
15 show them in front of the jury.

16 It is just a matter of giving counsel the
17 liberty in the courtroom to create the
18 demonstratives that he wants to use with his
19 witness and not forcing hand.

20 And, you know, I didn't object to that
21 because I think that is appropriate for Mr.
22 Wobbrock to do.

23 He's objecting to it after being given the
24 liberty to it, saying, well, you just missed an
25 opportunity.

1 But I think it is just fairness, trying to
2 give each side a fair chance to present their
3 case in the way that they want.

4 You have already instructed that we could
5 show the demonstratives as we use it, which
6 them, as we go forward, which is different, but
7 we'll do it, Your Honor.

8 Requiring us to give a package beforehand
9 strikes me as being more than what is
10 warranted, before it is actually shown to the
11 jury.

12 THE COURT: Right. You won't have to give
13 them the whole package but just the ones you
14 will use. And let's just see how it will work
15 out, counsel. If you have problems, let me
16 know.

17 Let's just go ahead and give them hard
18 copies. They will be giving you hard copies of
19 the ones you are going to use. You are
20 probably going to be getting them at the same
21 time as the person is on the witness stand, so
22 you'll have to read them real quick. But if
23 there's a problem, let the Court know. But
24 let's try and see how it works first.

25 MR. WOBROCK: Hard copies before they are

1 shown on the screen? Is that the rule?

2 MR. PHILLIPS: That's what we intend to
3 do.

4 THE COURT: Right.

5 All right. Any other small problems?

6 MR. PHILLIPS: To the issue that I wanted
7 to talk about, and this does relate to exhibits
8 and trying to, as we move forward with
9 witnesses, as it becomes more exhibit-intensive,
10 if we get done with this witness before the end
11 of the day today, I would like to have -- we
12 can discharge the jury a little early. But I
13 would like to spend some time with Mr. Lane and
14 you and me and whoever else on the plaintiff's
15 side wants to get it finalized, the plaintiff's
16 exhibits that you essentially pre-admitted,
17 with a couple of caveats, and then the
18 remaining defendant's exhibits to be offered
19 for admission that are no longer subject to
20 either withdrawal or exclusion.

21 THE COURT: All right. That will be fine.

22 MR. PHILLIPS: Thank you.

23 THE COURT: Bring the jury, please.

24 * * *

25 (Whereupon, the proceedings continued, in the

1 presence of the jury, as follows:)
2 * * *

3 THE COURT: All right. Good morning,
4 members of the jury.

5 JURORS: Good morning.

6 THE COURT: In case you are not counting,
7 this is the beginning of our fifth week of
8 trial. So I know you are ready to proceed.

9 But I know you have some administrative
10 concerns. And we will try to get to the bottom
11 of that. We have a new computerized system.
12 And I think it is not just this county that's
13 having problems. I think some other counties
14 are having problems, too. And we'll try to get
15 to the bottom of those problems as soon as we
16 can.

17 Thank you.

18 All right. Counsel for the defense, would
19 you call your next witness, please?

20 MR. DUMAS: Thank you, Your Honor.

21 The defendant calls Ms. Nancy Lund to the
22 stand.

23 THE COURT: All right.

24 Ms. Lund, please come up, please.

25 THE CLERK: Please remain standing and

1 raise your right hand.
2

3 NANCY LUND
4 was thereupon called as a witness on
5 behalf of the Defendant and, having been first duly
6 sworn, was examined and testified as follows:
7

8 THE CLERK: Thank you. Please be seated.
9 And for the record, will you please state
10 your full name?

11 THE WITNESS: Yes. My name is Nancy Lund.

12 THE CLERK: Spell your last name, please.

13 THE WITNESS: L-u-n-d.

14 THE CLERK: Thank you.

15 THE COURT: Ms. Lund, could we get you to
16 speak up a little bit? Your voice is fairly
17 soft. The jurors need to hear You. The
18 attorneys need to hear you. The other
19 attorneys need to hear you. And, last of all,
20 I need to hear you.

21 THE WITNESS: Okay.

22 THE CLERK: You need to speak real closely
23 to the microphone.

24 THE WITNESS: All right. So, I'll sit up
25 closely and see if it works.

1 THE COURT: All right.
2 Mr. Dumas, proceed, please.
3 MR. DUMAS: Thank you.

4
5 DIRECT EXAMINATION
6

7 BY MR. DUMAS:

8 Q Good morning, Ms. Lund.
9 A Good morning, Mr. Dumas.
10 Q How are you employed?
11 A I work for Philip Morris USA in New York
12 City.
13 Q How long have you worked for Philip
14 Morris?
15 A About 17 years.
16 Q Okay. So, you work in New York City?
17 A Yes, I do.
18 Q Do you live there, as well?
19 A No, I don't.
20 Q Where do you live?
21 A I live in [DELETED].
22 Q Where?
23 A In [DELETED].
24 Q How far is that away from [DELETED]?
25 A Well, it's about 40 miles, about an hour

1 and a half on the train every day.

2 Q You take the train to work every day?

3 A Yes, I do.

4 Q Do you have family?

5 A Yes, I do.

6 Q Tell us about your family.

7 A Well, I have a husband. And I have a son
8 who's 13-years old. And a dog named Chance.

9 Q Well, since your son might want his name
10 mentioned, as well, along with the family dog,
11 what's his name?

12 A I didn't mention his name. His name is
13 Jeff.

14 Q Jeff. All right.

15 What is your job title, Ms. Lund?

16 A I'm the Senior Vice President of
17 Marketing.

18 Q Senior Vice President of Marketing. What
19 does that mean? What do you do?

20 A Well, my job is to coordinate the
21 activities of all of our domestic cigarettes brands,
22 brands like Marlboro and Benson & Hedges and Merit
23 and Basic and Virginia Slims. So, to develop the
24 marketing plans to see to it that the marketing
25 plans happen in the marketplace.

1 Q And you have been in the marketing
2 department at Philip Morris for 17-plus years?

3 A Yes.

4 Q How old are you?

5 A I'll be 50 in October.

6 Q Congratulations, I guess.

7 Who do you report to? Who is your
8 boss at Philip Morris?

9 A I report to the Chief Executive Officer
10 and President Mike Szymanczyk.

11 Q Do you have any other intervening boss or
12 do you report to the head guy at Philip Morris?

13 A I do report to the head guy, yes.

14 Q Anyone else you report to in between you
15 and the head guy?

16 A No.

17 MR. DUMAS: All right.

18 Demonstrative No. 1, please.

19 Any objection, counsel?

20 MR. WOBROCK: One second, please.

21 No objection.

22 THE COURT: Proceed, please.

23 BY MR. DUMAS:

24 Q Ms. Lund, at my request, did you have
25 prepared a simple, I guess it is simple,

1 organizational chart showing the senior vice
2 presidents who report to the President
3 Mr. Szymanczyk?

4 A Yes, I did.

5 Q Okay. And it looked like there's, what
6 ten, 11, 12 senior vice presidents?

7 A Twelve.

8 Q Okay. And you're one of them?

9 A Yes, I am.

10 Q You are right here over on the -- there we
11 go.

12 Thank you, Mr. Walsh.

13 A Yes, that's me.

14 Q That's you. Okay.

15 Now, you talked a little bit about
16 your job description. What do you do on a day-in,
17 day-out basis? When you get in the office and you
18 have got your cup of coffee, what are you doing?

19 A Well, I work the folks in the brand
20 marketing area. And I work with them to try to
21 understand the marketplace, the cigarette
22 marketplace in the United States, and I try to help
23 them build plans to increase our market share in the
24 United States marketplace, so to kind of understand
25 the market and to understand the brands that we

1 have, and to see if we can find ways to connect the
2 brands that we have with the adult smokers out in
3 the marketplace.

4 Q What are you prepared to talk to this jury
5 about today?

6 A Well, I am prepared to talk about how we
7 market our cigarette brands in the United States. I
8 am prepared to talk about Merit cigarettes and
9 Benson & Hedges cigarettes and prepared also to talk
10 about how we market our light and low-tar
11 cigarettes. And also, if I have the opportunity, to
12 talk a bit about how things have changed over the
13 years in the way we do what we do.

14 Q The way Philip Morris does what it does?

15 A Yes.

16 Q Is there anyone at Philip Morris in the
17 marketing, in the advertising department who's more
18 senior than you?

19 A No, there isn't.

20 Q Is there anyone at Philip Morris, New York
21 City, is there anyone at Philip Morris New York City
22 who is more familiar, more responsible for the way
23 Philip Morris markets and advertises its products
24 than you?

25 A No, there is not anyone.

1 Q Let's talk a little bit about your
2 background.

3 Where were you born and raised?
4 A I was born in Somers Point, New Jersey.
5 And I grew up in a small town right next to it
6 called Northfield, New Jersey.

7 Q Where did you go to high school?
8 A I went to Mainland Regional High School,
9 in Linwood, New Jersey, the town next to New York
10 Field, New Jersey.

11 Q Where did you go to college?
12 A Lafayette College in eastern Pennsylvania.
13 Q Tell us about Lafayette College.

14 A Well, it's a liberal arts college right on
15 the Delaware River. And it also has an engineering
16 school and a science program.

17 Q What year did you graduate from Lafayette?
18 A I graduated in 1974.

19 Q What was your major or degree in?
20 A I had a bachelor of arts degree in French
21 much.

22 Q Not marketing? French?
23 A No. French.
24 Q Okay. Not French marketing? French?
25 A No. French. French.

1 Q Okay. How does a French major end up at
2 the head of marketing at Philip Morris USA?

3 A Well, I don't know that being a French
4 major has anything to do with how I'm a Senior Vice
5 President of Marketing. And it's a pretty long
6 story from there to here.

7 Q All right. So, you graduated from college
8 in 1974. What did you do after that?

9 A Well, I stayed on at Lafayette College.
10 And I raised money for Lafayette for five years.

11 Q Five years raising money. What was your
12 job title, and what did you do for the college?

13 A I was Associate Director of Development.
14 And development really means fund raising. And my
15 job was to talk to alumni, get to know the alumni of
16 the college, and to see if we could convince those
17 alumni to write checks to Lafayette College, make
18 contributions to Lafayette College, instead of
19 making contributions elsewhere.

20 Q Was that kind of a marketing job?

21 A Oh, I would say it is very much a
22 marketing job, yeah.

23 Q What did you learn in your five years as
24 being a fund raiser for Lafayette College? What did
25 you learn about marketing?

1 A Well, I think I learned some of the
2 basics. You know, I think you really have to reach
3 out and try and understand the market. You know, in
4 this case, it was alumni and parents and friends and
5 corporations and foundations, and understand why and
6 what they make contributions to, to figure out if
7 they would want to make a contribution to Lafayette.
8 So, market is very important in the equation.

9 Q Did you like that job?

10 A I loved that job.

11 Q Why?

12 A Well, it was very challenging. To get
13 people to write checks and make contributions is a
14 hard job.

15 Q You said you were there for about five
16 years. What did you do after you left the fund
17 raising job at the college?

18 A I went to work for Wells Rich Greene,
19 which was an ad agency in New York City.

20 Q And what was it about that job that
21 attracted you enough to leave the college?

22 A Well, I had been doing that fund raising
23 job for about five years, and I thought, boy, the
24 chance to go to New York City was, first of all,
25 very exciting, and to go and work for a big ad

1 agency and learn how the agencies develop their
2 advertising and created the ads was really, really
3 quite a neat opportunity. So, that's why I went.

4 Q Okay. So, you moved to New York City
5 about what year then?

6 A It was about 1979.

7 Q Tell us a little bit about Wells Rich.
8 You said it was an advertising agency. Tell us
9 about that.

10 A Well, it was a big advertising agency.
11 And it had lots of clients. It had New York State
12 as a client. It had Procter & Gamble as a client.
13 It had many clients.

14 Q What was your job title there?

15 A I was an Assistant Account Executive when
16 I went to work at Wells Rich Greene.

17 Q What does an Assistant Account Executive
18 do?

19 A Well, I think the Assistant Account
20 Executive, and all kind of account executives, our
21 job was to talk with the brand managers at those
22 clients, like at Procter & Gamble, which is what I
23 worked on, and talk to those brand managers and find
24 out what it is they wanted to do with their brands,
25 how they wanted to market the brands, what kind of

1 advertising they wanted, what kind of media they
2 wanted, what kind of promotions they wanted. And
3 then go back to the ad agency and talk to the
4 creative people, you know, like the copywriters and
5 the art directors and the media buying department,
6 and all of those folks, and see if we could create
7 advertising and promotion ideas that would meet what
8 the brand manager wanted to do.

9 Q Sort of like a liaison between the company
10 and the creative folks?

11 A Yeah, kind of a go-between.

12 Q How long did you work at Wells Rich, all
13 totaled?

14 A Well, I worked there about five and a half
15 years.

16 Q Did you work on, initially, did you work
17 on any products that we would be familiar with?

18 A Yeah. Definitely.

19 Q Okay. Tell us about that.

20 A I worked on Safe Guard soap and Shore
21 deodorant, both of which were Procter & Gamble
22 products.

23 Q Soap and deodorant?

24 A Yes.

25 Q Is there anything interesting about

1 working Soap and deodorant?

2 A Yes.

3 Q What would that be?

4 A Well, I mean, you know, I think everybody
5 thinks that is pretty boring, to work on soap and
6 antiperspirant because kind of everybody knows about
7 soap and antiperspirant. But the truth of the
8 matter is they were very competitive marketplaces.
9 When I worked on safeguard soap, Dial was our key
10 competitor. And trying to get market share from
11 Dial was really, really hard.

12 Q When you were at Wells Rich, did you come
13 to learn the process by which companies make
14 decisions about advertising and have advertising
15 budgets?

16 A Yes.

17 Q Okay. What, in a competitive market like
18 deodorant or so, what are the key concepts, the key
19 things that you learned while you were at Wells
20 Rich?

21 A Well, I think, you know, that's where I
22 learned the whole idea about switching and
23 competitiveness in the marketplace, that, you know,
24 what our advertising was really trying to do, was to
25 try to create a brand that's different from another

1 brand and so that people had a choice between this
2 brand and another brand.

3 And that really involves two things.
4 It involves trying get somebody to switch to your
5 brands like Safeguard soap, but it also involves
6 trying to make sure that people who are buying
7 Safeguard soap don't switch to Dial soap. So, the
8 whole idea of kind of loyal any switching were
9 things I learned at Wells Rich Greene.

10 Q So, you said that you were at Wells Rich a
11 total of five years, but I understand you left after
12 a couple of years?

13 A I did.

14 Q Okay. You after a couple of years, where
15 did you go?

16 A I went to work for a New York hospital,
17 Cornel Medical Center in New York City.

18 Q Why did you make that move, and what did
19 you do when you got there?

20 A I received a call from, I don't recall who
21 it was, but someone asking me whether I would
22 consider raising money for New York hospital Cornel
23 Medical Center. And they told me what they were
24 trying to do in terms of increasing their annual
25 giving and so forth. So I said I would do that. So

1 I went over to do that.

2 Q I gather that's a big hospital?

3 A Oh, it is huge, yeah.

4 Q How long did you do that?

5 A I did it for about a year.

6 Q Then apparently returned to Wells Rich?

7 A Yes.

8 Q Why did you go back?

9 A Well, it seems like there was a lot of
10 phone calls going on. I get a phone calls from
11 Wells Rich Greene asking if I would come back. And
12 I gave it a thought and did go back.

13 Q Was there some particular project that
14 they wanted you to work on?

15 A Yes. They wanted me to work on the
16 introduction of Players cigarettes for Philip
17 Morris.

18 Q Now, what year would this be?

19 A That would have been about 1982.

20 Q I don't know that we have heard that name
21 before, Players cigarette?

22 A Yes.

23 Q That's a brand name?

24 A Yes.

25 Q Of a cigarette made by Philip Morris?

1 A Yes.

2 Q Is it still in existence today?

3 A Yes.

4 Q At that time, Ms. Lund, had you had any
5 experience in the cigarette business?

6 A No, I hadn't.

7 Q Were you a smoker?

8 A No.

9 Q What did you -- what was your reaction to
10 going back to Wells Rich and working on an
11 advertising campaign for a cigarette?

12 A Well, you know, I think that when I
13 received that phone call to go back and work on
14 cigarettes, I had a lot of thinking to do. I had to
15 I wasn't a smoker. My parents were smokers. I had
16 a brother who was a smoker.

17 So, I thought, you know, I know
18 people who smoke. I know people who didn't smoke,
19 like myself. But I had to make a choice about
20 whether I thought it was okay to work on cigarettes.
21 And I had to work through that questioning to be
22 sure that I could do it and really do it with all of
23 my heart.

24 Q What do you mean if it was okay?

25 A Well, I mean, you know, cigarettes are

1 dangerous. And, you know, I wanted -- I wanted to
2 be sure that I spend my life's work doing things
3 that are important and legitimate. And cigarettes
4 are dangerous. So, it was a big decision. I had to
5 really, you know, wrestle with it.

6 Q All right. But eventually you took the
7 job?

8 A I did.

9 Q Tell us about Players? Well, first of
10 all, tell us what you did when you went back the
11 second time to Wells Rich? Then tell us a little
12 bit about the product that you worked on, Players
13 cigarette?

14 A Well, I was in the account department
15 again. I think I was an account supervisor. And
16 Players cigarettes hadn't been introduced in the
17 marketplace yet.

18 When I got there, it was going to be
19 a menthol cigarette. And then our competitor R.J.
20 Reynolds introduced another brand in this same kind
21 of package, a very stylish black package called
22 Sterling Cigarettes. It wasn't just a menthol
23 cigarette. It was also a regular cigarette. So we
24 had to scramble and completely redo everything and
25 turn this Players cigarettes into a regular and

1 menthol cigarette.

2 Q So, maybe I missed it. So, the Players
3 was a brand new product?

4 A It was a brand new product.

5 Q And you were involved in creating the
6 advertising or marketing campaign sort of from the
7 ground up?

8 A Yes.

9 Q Tell us about what Players cigarettes was
10 all about? What was the intended niche, if you
11 will, for Players cigarettes?

12 A Well, you know, it was in the 1980's, and
13 there appeared to be an audience of kind of adult
14 smokers, kind of 20-something smokers. Urban young,
15 urban professionals. I think we used to call them
16 yuppies. I don't know if that's still used very
17 much. But yuppies, young urban professionals, who
18 kind of wanted a cigarette of their own. Maybe
19 didn't want to smoke Marlboro anymore or smoke Camel
20 cigarettes anymore. And that's what Players
21 cigarettes was for.

22 Q Why don't you tell us how you went about
23 Ms. Lund, creating an ad campaign for Players?

24 A Well, I think the way one creates most any
25 advertising campaign, it goes back to that idea of

1 kind of trying to understand the market. So we
2 would try to understand adult smokers and why they
3 were switching from one brand to another, whether
4 they would like to switch to another brand, for
5 example.

6 We would do focus group research,
7 where we would show them the packs of cigarettes,
8 and we would show them the ads and so forth, and see
9 whether it communicated something that was relevant
10 to them.

11 Q What are focus groups?

12 A Well, that's when you bring usually about
13 seven or ten people into a small room. Usually
14 there's a two-way glass, and sometimes people sit
15 behind the glass and listen. And the moderator says
16 there are people watching and listening. Then the
17 moderator asks the folks questions about the
18 product, asks people questions about the advertising
19 or about the promotion ideas, and try to gather
20 information about why these people or some other
21 adult smokers who might want to choose what we were
22 showing them.

23 Q Would you obtain feedback or input from
24 these smokers about the color of the box and the
25 advertising slogans that you were thinking of using?

1 A Oh, sure.

2 Q Is that what it's all about?

3 A It is important to hear all the of input.
4 I'm not going to say that we would take all of the
5 input. But you learn lots of things when you listen
6 carefully. And sometimes I think very often the
7 consumers really help you create your advertising.

8 Q Who would comprise these focus groups?

9 What kind of folks?

10 A Well, we would always call adult smokers
11 in to be the people we talk to because that's who we
12 are marketing our products to.

13 Q Let me digress just for a moment.

14 In your almost 20 years being
15 involved in focus groups that involve cigarettes,
16 how many do you think you have been involved in, in
17 one degree or the other, of actually being behind
18 the glass or reviewing data from focus groups? How
19 many do you think you have been involved in at Wells
20 Rich and Philip Morris?

21 A A lot. I mean, probably more than 100.

22 Q And looking back on those, can you think
23 of a single instance in any of those focus groups
24 where Philip Morris sought input from either
25 nonsmokers or underage smokers?

1 A No, absolutely not.

2 MR. WOB BROCK: Your Honor, I think I have
3 a matter for the Court.

4 THE COURT: All right.

5 Counsel, do you want the jury out?

6 MR. WOB BROCK: Yes. I have a matter for
7 the Court.

8 THE COURT: Would you step out a moment,
9 jurors, please?

10 * * *

11 (Whereupon, the proceedings continued,
12 out of the presence of the jury, as follows:)

13 * * *

14 MR. WOB BROCK: Mr. Tauman will argue this,
15 Your Honor.

16 THE COURT: All right.

17 Mr. Tauman, you may proceed, please.

18 MR. TAUMAN: Your Honor, this is a very
19 narrow and very important issue and one which
20 the defendants felt was extremely important,
21 and that is the concept of underage smoking,
22 which Your Honor ruled was not part of this
23 case.

24 We have been very careful, as Your Honor
25 knows, to confine our evidence to youth

1 smoking.

2 You may say, well, what's the difference?

3 Well, underage smoking means illegal
4 activities.

5 Youth marketing has to do with a marketing
6 strategy.

7 And I think that it is important the Court
8 caution this witness and counsel that the word
9 underage was part of their motion in limine
10 that we voluntarily agreed to.

11 And so that concept of underage smoking,
12 whether it's the pro or the con has not been
13 part of this case and should not be part of
14 this case.

15 And I'll add, just as a parenthetical,
16 that another one of the defendant's motions in
17 limine was the smoking habits of anyone other
18 than people who had to do with Michelle Schwarz
19 herself or someone who had to do with Merits.

20 Both counsel in his question and this
21 witness in her answers repeatedly have made
22 reference to this witness' smoking habits.

23 And counsel should be cautioned about that
24 motion in limine also.

25 MR. DUMAS: With regard to the latter

1 point, Your Honor, I certainly don't intend to
2 go back there again. It simply dealt with the
3 soul searching, if that's the right word, that
4 this witness went through when she was asked to
5 be involved in a cigarette campaign.

6 But I certainly don't intend on asking her
7 any further questions about her smoking
8 situation personally.

9 MR. TAUMAN: Let me just address that
10 issue before we go. I'm sorry. I would rather
11 do one at a time here.

12 And that is that Mr. Dumas has
13 acknowledged that he intentionally asked her a
14 question that violated his own motion in
15 limine.

16 And I think that that is -- I mean, if
17 it's inadvertent, that's one thing. If the
18 witness blurts it out, that's another thing.

19 But to ask the witness a question that
20 violates the motion in limine, intentionally,
21 to elicit that evidence for the jury, I think
22 there has to be some caution here, Your Honor.

23 MR. PHILLIPS: Your Honor, my I address
24 the Court?

25 THE COURT: You may, counsel.

1 MR. PHILLIPS: Again, we keep going back
2 to what the Court ruled on that issue. And we
3 just have a difference of opinion here.

4 We have also had both. We had Dr. Whidby
5 testify about his smoking history without
6 objection. That's a witness who testified
7 regarding his smoking history.

8 The Court has not prohibited, and counsel
9 is not reciting any chapter and verse regarding
10 prohibition regarding a brief inquiry with
11 respect to smoking history of any witness, for
12 that matter.

13 Now, we have heard smoking histories from
14 all of the family members. That's just
15 generally gone into. They haven't
16 over-emphasized it. They have done it.

17 We have heard from Dr. Whidby.

18 I'm not aware of any prohibition this
19 Court has placed on Mr. Dumas or me or them,
20 for that matter, in terms of briefly going into
21 smoking history with respect to the prospective
22 interests or bias of any witness.

23 I just think we did have some initial
24 rulings. The ruling focussed primarily on
25 whether or not I could go into the other family

1 members.

2 Ultimately, Mr. Wobbrock said we are not
3 concerned about that during the trial because
4 he wanted to do it himself, and that issue went
5 by the by.

6 But, you know, when Mr. Tauman stands up
7 and tells you that Mr. Dumas deliberately
8 crossed a line, I don't think the Court has
9 drawn any line with respect to inquiry of
10 witnesses with respect to their smoking
11 history, particularly Philip Morris witnesses
12 for the purpose of showing either that they
13 have some kind of interest or they have some
14 kind of what their relationship is to their job
15 and so forth. It's a perfectly legitimate
16 question.

17 THE COURT: All right.

18 That second part, was anybody going to
19 talk about the second part, underage smoking?

20 MR. DUMAS: Well, yes, Your Honor. There
21 has been a lot of evidence offered to this jury
22 about, quote, "youth smoking."

23 And sitting here right now, I can't
24 represent to the Court that each and every
25 witness called by the plaintiff used only the

1 word youth smoking.

2 But the fact of the matter is youth
3 smoking, to most folks, means smoking under 18,
4 since most people know that's the lawful age to
5 purchase and consume cigarettes.

6 Certainly, the plaintiff's evidence,
7 looking at it from their viewpoint, is that
8 Philip Morris intentionally engaged in youth
9 marketing.

10 I am entitled, Your Honor, to defend my
11 client on that broad allegation. And I
12 certainly intend on doing so with regard to
13 evidence and testimony regarding the practices
14 of Philip Morris as it concerns youth smoking,
15 which is a broad subject.

16 Mr. Phillips might want to --

17 MR. PHILLIPS: I don't want to keep
18 jumping in, but, obviously, there were a number
19 of exhibits that were produced to the jury and
20 shown to the jury that had numbers below the
21 age 18. And they were there for a purpose.

22 And so, obviously, this witness, you know,
23 is likely to be cross-examined regarding those
24 exhibits. They have already been before the
25 jury. And the witness needs to be able to

1 explain her job and what she does.

2 And we begin making a logistical
3 distinction here or a semantical distinction
4 that doesn't really ultimately any make sense,
5 when you have documents in the record relating
6 to Philip Morris' understanding that underage
7 smokers do smoke and public studies that
8 Mr. Johnson looked at and so forth.

9 All of that is before the jury at this
10 point. So, it is perfectly all right for the
11 witness to respond to that evidence that's been
12 presented to the jury.

13 MR. DUMAS: And I would like to add one
14 comment to that, Your Honor.

15 You may recall that we did a motion -- the
16 defendant did a motion in limine to preclude
17 redacted documents as it concerned underage
18 smoking, below 18.

19 And we argued at some length about that
20 issue. And we felt that references to smoking,
21 12, 14, 16, 17 should not come in, whether in
22 documents or argument.

23 The Court overruled that, for the most
24 part, and allowed in Philip Morris documents,
25 some documents that do contain references to

1 youth under 18.

2 THE COURT: All right.

3 Thank you, both counsel.

4 Let's just try to have the witnesses, when
5 we get into that, to emphasize youth smoking,
6 in lieu of the underage smoking.

7 Sure, some testimony will come in about
8 underage smoking, but that is not something to
9 emphasize because of the idea that it indicates
10 illegal marketing. And I'm sure the marketing
11 department of Philip Morris does not market to
12 underage smokers.

13 But there's a youth market. And, in my
14 opinion, from 18 to 20, there's a youth market
15 for young people who haven't made up their mind
16 about a lot of things.

17 You know, some of us, older folks, have
18 gone through the situation where we have had 18
19 and 19-year-old kids. They are not very
20 mature. Let me tell you, they are youth, they
21 are youth, they are youth, all the way through.
22 And this witness, I think, has a 13-year-old
23 son. He will be 18, one of these days. And I
24 just want to share with her he will be a youth,
25 he will be a full youth.

1 We just don't want to get into inferences
2 on underage smoking. I don't think that's what
3 you are trying to do.

4 MR. DUMAS: Well, later on, Your Honor, I
5 am going to talk about that distinction that
6 the Court has made and Philip Morris' view and
7 marketing efforts with regard to young adults,
8 youth, whatever is the correct term, 18 and
9 older, and drawing the distinction that Philip
10 Morris does not market or advertise
11 intentionally to youth, under 18. And
12 that's -- I have got to present that evidence,
13 Your Honor.

14 THE COURT: Fine.

15 MR. DUMAS: Okay. Thank you.

16 THE COURT: Bring the jury.

17 MR. TAUMAN: Before we bring the jury in,
18 because this is likely to come up again because
19 Mr. Dumas has expressed an intention of doing
20 so, the motion in limine that defendant made
21 was titled and argued as a motion not to allow
22 any counsel, witness, et cetera to mention
23 youth smoking, youth marketing or underage
24 smoking.

25 And we agreed that we would not mention

1 underage smoking.

2 The Court denied the balance of their
3 motion, with a limitation that it had to be
4 some reference to Michelle Schwarz.

5 Our argument was, of course, that by
6 targeting youth, and I will call youth even
7 lower than 18, people who are under 18, they
8 were in a sense grooming or giving her
9 permission to smoke.

10 And I think Your Honor agreed that it had
11 to be something that had a proximity, a nexus,
12 with Michelle Schwarz.

13 I believe this witness has been called
14 primarily to give evidence to this jury about
15 the new Philip Morris, the new Philip Morris
16 since 1998, the new Philip Morris that now has
17 an anti-youth smoking program, the Weak Heart
18 Program, the Access Program.

19 This is totally irrelevant to any issue
20 that Your Honor has allowed under the rubric of
21 youth smoking. And we are going to find
22 ourselves with the jury out, you know, in an
23 hour or two hours talk about just this.

24 So, I think we should get it on the table
25 and get it decided.

1 We were both prohibited by the Court and
2 honored that in focussing our evidence on
3 marketing to youth in a time proximity to
4 Michelle Schwarz' commencement of smoking.

5 This witness, of course, will reflect on
6 her age at that time, but the fact is that she
7 certainly wasn't working for Philip Morris at
8 that time.

9 MR. DUMAS: First of all, Your Honor, we
10 lost our motion in limine regarding youth
11 smoking, first and foremost.

12 Second, this witness is going to talk
13 about Philip Morris' marketing from 1960
14 forward, specifically as it addresses, as it
15 relates to Benson & Hedges cigarettes. Okay.
16 We are entitled to do that.

17 Second and third, I should say, this
18 witness is going to address changes that have
19 occurred in Philip Morris starting around 1995
20 and the changes that are ongoing up to today.

21 This is a punitive damages case, Your
22 Honor. We are entitled to present evidence
23 concerning the defendant's post-injury conduct.
24 And we intend on doing that, Your Honor.

25 THE COURT: All right.

2 It seems that there is a nexus with the
3 Benson & Hedges since Michelle Schwarz smoked
4 Benson & Hedges during that time, and they are
5 going to talk about advertising during that
time.

6 And certainly counsel has a right to
7 cross-examine on new changes that have been
8 made that were not present at the time that
9 Michelle Schwarz was in the process of smoking.

10 MR. TAUMAN: Yeah. I know we have an
11 opportunity to cross-examine. I agree with you
12 entirely.

13 But if this witness is giving evidence on
14 their marketing goals, efforts, trends,
15 whatever, during the relevant time period that
16 Your Honor has set out, we have no objection.
17 We may not like what she says, but we have no
18 objection, and we can cross-examine her.

19 When she starts talking about the, maybe
20 Your Honor is familiar with this, the Access
21 Program, the Weak Heart program, the things we
22 see on TV ads, starting, you know, last year or
23 the year before, that have nothing to do with
24 Michelle Schwarz.

25 The defendant argued repeatedly that any

1 evidence of punitive damages has to have some
2 causal connection to Michelle Schwarz.

3 You know, we didn't like it, but we
4 realize that this is not an indictment process
5 that is a part from this case, that there has
6 to be that some type of causal nexus with the
7 damage and the injury that Michelle Schwarz
8 suffered.

9 Likewise, the response, the evidence
10 against punitive damages has to have that same
11 nexus. And, clearly, this evidence that we are
12 talking about from 1995 or 1998 or 1999 or 2001
13 or 2002 has no nexus to any injury suffered by
14 Michelle Schwarz.

15 MR. PHILLIPS: Your Honor, this is an
16 unbelievable argument based on the way they
17 have presented their case.

18 They put on evidence suggesting that
19 Michelle Schwarz was groomed to start smoking
20 Benson & Hedges on her 18th birthday. They
21 argued, put on an offer of proof, and won that
22 after the Court had preliminarily said, no, we
23 are not going to go beyond that period, and
24 showed documents in the 70's and 80's saying we
25 need to show that, Your Honor, because it shows

1 the continuing conduct. Philip Morris is still
2 marketing, targeting youth. And he put it all
3 on, and he got all of that evidence in.

4 And Mr. Dumas is absolutely right. We
5 have to be able to respond to that to show both
6 that that is not what we did then and we have
7 doubled efforts now to prevent kids from
8 smoking.

9 This is punitive damages case. And it is
10 absolutely linked to the allegations in this
11 case that say that Michelle Schwarz was groomed
12 to begin smoking before her 18th birthday by
13 Philip Morris. That's a material allegation in
14 this case.

15 And if there's an allegation with respect
16 to punitive damages, with respect to that, then
17 we need to be able to show that that didn't
18 occur and there's no need to punish Philip
19 Morris today with respect to that conduct
20 because, to the extent you conclude it did
21 exist in 1960, it certainly doesn't exist
22 today.

23 THE COURT: Let me ask you a question,
24 counsel.

25 You are going fast. Slow it down just a

1 bit.

2 MR. PHILLIPS: I apologize. It is only
3 Monday morning. I have got to slow down.
4 Sorry.

5 THE COURT: If this witness would like to
6 talk about the Weak Heart Program, what nexus
7 is that with Michelle Schwarz?

8 She never saw a Weak Heart Program? How
9 do you connect that?

10 If your argument is their allegations are
11 that we groomed underage people so that, when
12 they became smoking eligible, they would be
13 ready --

14 MR. PHILLIPS: Right.

15 THE COURT: And your defense says we
16 didn't do that. And you put your evidence on,
17 we didn't do that. So, since you didn't do
18 that, why do you want to pile on the new
19 programs that you just out of the goodness of
20 your heart decided to do, like the Weak Heart
21 Program and the various programs that are in
22 effect now that are not in response to those
23 things that you didn't do, because you didn't
24 do them? These are completely new things that
25 have an angelic glow because it didn't come

1 from any ulterior motives or ulterior
2 procedures. Just the company grew and expanded
3 and decided we are going to do things
4 different, but it wasn't in response to any
5 prior bad conduct.

6 So I'm saying I don't see the connection.

7 If you are saying we did do some prior bad
8 conduct, and as punitive damages issue here's
9 what we changed, that might be one thing.

10 But if your argument is we didn't do
11 anything wrong, and here's how we changed, I
12 don't see the relevance of here's how we
13 changed to no prior bad conduct, because
14 generally it is like rehabilitating a witness.
15 Rehabilitating an entity. If the entity didn't
16 do the bad thing, then there's no need to
17 rehabilitate that entity.

18 You only need to rehabilitate the person
19 who has allegedly done something that they
20 should not have done. Then you have a right to
21 rehabilitate that person and bring them up on a
22 higher level.

23 So, a corporate entity, rehabilitation
24 would not span any greater view than an
25 individual witness that you was trying to

1 rehabilitate.

2 MR. PHILLIPS: Two responses, Your Honor.
3 The first one is this.

4 They put on evidence in the 70's and the
5 80's that Michelle Schwarz, when she was a 30
6 and 40-year-old woman, that Philip Morris was
7 still tracking kids, was still looking at
8 underage kids. The documents were shown to the
9 jury. You saw the numbers. They were all
10 shown to the jury, Your Honor.

11 THE COURT: Right. You guys plan to
12 respond to that.

13 MR. PHILLIPS: Absolutely. And that is
14 part of what we are saying in terms of saying
15 we didn't do it in the 60's -- we didn't do it
16 in the 60's, we didn't do it in the 70's, we
17 didn't do it in the 80's, and we didn't do it
18 in the 90's, and we are not doing it now.

19 Now, on the second question, which is,
20 well, isn't that inconsistent? Don't you have
21 to admit you did something wrong, if you are
22 saying you're doing something good now?

23 I mean, that's a rhetorical point you're
24 making with me, Your Honor. Isn't it, really?

25 It is not a question of what the defendant

1 has the right to do with respect to defending
2 itself.

3 The jury has to determine in this case, if
4 it determines that there's liability, and
5 that's what we are talking about, this is a
6 unitary trial, we wanted to bifurcate some of
7 these issues, this is a unitary trial, so we
8 have to defend against both liability and
9 punitive damages at once.

10 And in doing that we, in fact, have to do
11 both things. We have to say we didn't do that
12 and show the evidence on that.

13 And we need to show, in the punitive
14 damages context, ladies and gentlemen of the
15 jury, if you disagree with us, then you need to
16 know about whether what we are doing now for
17 purposes of evaluating the importance of
18 punitive damages to deter us now.

19 Is it important to you, as a jury, to
20 award \$300 million, as Mr. Wobbrock so urgently
21 asks you to do, when we are doing the things
22 that we are doing now in the marketplace and we
23 are doing more than anybody else is doing?

24 That's important, Your Honor. That's very
25 important in the context of a statute in this

2 state which requires the jury to evaluate the
3 deterrent effect of punitive damages.

4 We have a unitary trial. Liability and
5 punitive damages are being addressed at the
6 same time. And this jury they have to be able
7 to deal with both of those issues.

8 MR. DUMAS: Your Honor, may I add, very
9 briefly, Your Honor?

10 THE COURT: Certainly, counsel.

11 MR. DUMAS: This witness' testimony is not
12 inconsistent with Philip Morris' stated
13 position, as Mr. Phillips indicated, because
14 this witness is going to say Philip Morris
15 understands that its advertising was out there
in the general world.

16 And, yes, because of the very nature of
17 advertising you can't insulate folks under 18.

18 And some of those folks probably saw some
19 of those ads. And how are we going to deal
20 with that? And here's how we are dealing with
21 it.

22 In a punitive damages case where there's
23 been a lot of evidence of underage youth
24 smoking, the defendant is entitled to put that
25 evidence on, Your Honor, for the jury's

1 consideration.

2 THE COURT: Counsel for the plaintiff,
3 anything further?

4 MR. TAUMAN: Not really.

5 I think that we are still at the same
6 place, that we were required to show a nexus
7 between the behavior of Philip Morris in
8 targeting youth with the life experience of
9 Michelle Schwarz.

10 Your Honor did allow us to go somewhat
11 beyond the 1964 data. I believe that we had
12 documents that reflected a policy into the 70's
13 that Philip Morris had of studying youth and
14 targeting youth.

15 But we were not allowed to go any place
16 beyond the 1970's.

17 Our argument for the 1970's is that that
18 was close enough in time that it reflected a
19 mindset of Philip Morris that then proved --
20 that that sort of reinforced the documents that
21 we had that were contemporaneous with Michelle
22 Schwarz' smoking history.

23 I think that allowing the witness to go
24 essentially into contemporary times, into the
25 current era, is simply an apology to the jury

1 and allowing them to consider sympathy for
2 Philip Morris.

3 This is not -- I mean, obviously, they
4 have used their powerful public relations
5 scheme to put this in front of the American
6 people.

7 And I would bet you anything that each of
8 these jurors has seen that on television, but
9 it doesn't have a relevant place in the
10 courtroom.

11 They would like to say that they are good
12 people now, but the issue that the Court has
13 laid down or the restriction the Court has laid
14 down is that they have to show that they were
15 good people at the time in relation to Michelle
16 Schwarz.

17 MR. DUMAS: Your Honor, in a punitive
18 damages case a defendant is unentitled to
19 defendant themselves by putting evidence on of
20 how they have responded to a problem. And that
21 response is started six years ago or so and it
22 continues today.

23 And the Court will instruct the jury that
24 part of what the jury is to consider is how the
25 defendant responded to the problem.

1 And this is evidence. This is the key
2 that evidence that we need to get out in front
3 of this jury.

4 Counsel can cross-examine. He can
5 cross-examine to say it is too little, too
6 late. He can cross-examine that, you know, we
7 are not really doing it because we are nice
8 people, we are doing it because of litigation
9 strategy, et cetera, et cetera. And I'm sure
10 he will do that. But the jury is entitled to
11 hear that evidence and make its own decision.

12 THE COURT: The Court is inclined to agree
13 with the defense on that, counsel, that, as to
14 the punitive damage aspect of the case, they
15 should be allowed to present evidence of the
16 changes that they have made.

17 It appears to the Court it is like playing
18 with fire. You have a right to play with fire,
19 if you wish. But you also have to be aware of
20 the fact that you can get burned by it.

21 The Court is going to let them play with
22 the fire. And we shall see the results. That
23 is the Court's ruling.

24 Bring the jury, please.

25 MR. TAUMAN: Thank you, Your Honor.

1 MR. DUMAS: Are we going to take a 10:30
2 break, Your Honor?
3 THE COURT: Yes.
4 MR. DUMAS: Otherwise, I was going to ask
5 for a one-minute continuance.
6 THE COURT: We will stop at 10:30.
7 MR. TAUMAN: You have to run out between
8 questions.

9 * * *
10 (Whereupon, the proceedings continued, in the
11 presence of the jury, as follows:)
12 * * *

13 THE COURT: All right.
14 Mr. Dumas, will you proceed with your
15 questions, please?
16 MR. DUMAS: Thank you, Your Honor.
17 BY MR. DUMAS:
18 Q Ms. Lund, before the break, we were
19 talking about work with Players cigarettes; correct?
20 A Yes.
21 Q You talked a little bit about the focus
22 groups that you were involved with for Players
23 cigarettes; correct?
24 A Correct.
25 Q And you were also talking about the

1 up-to-100 or so focus groups that you have been
2 involved with during your 20 years or so in the
3 cigarette business?

4 A That's correct.

5 Q All right. We are not going to repeat
6 that stuff. But I wanted to, before we move on to
7 Benson & Hedges cigarettes, which is something I
8 want to get to you in just a moment, I want to go
9 back on one issue and be sure I understand your
10 testimony. And that is concerning the issue of the
11 importance of consumer input in what you do. Would
12 you please tell us how important that is?

13 A Well, I think it is very important. I
14 think that, you know, we can't operate in a world
15 where we don't understand our consumers. And I
16 think that, as marketers, I think good marketers
17 really try to understand the market, try to
18 understand what smokers want, whether our products
19 can deliver it. In order to be successful, I think
20 one has to do that. And we have to seek the input,
21 ask the questions, show ideas. And I would say I
22 think it's very important.

23 Q When it comes to the marketplace,
24 Ms. Lund, who is in control, the consumers or Philip
25 Morris or the advertisers?

1 A Well, you know, I think a lot of people
2 have a lot of opinions about that. My opinion is
3 that the marketplace is in control.

4 MR. WOBROCK: Your Honor, this witness is
5 called as a fact witness, not listed as an
6 expert witness. I think opinions are beyond
7 the scope of this witness' testimony.

8 MR. DUMAS: Your Honor, her position with
9 Philip Morris certainly entitles her to give
10 some opinions concerning marketing and
11 advertising. That will be the subject of her
12 testimony.

13 MR. WOBROCK: Your Honor, that may be the
14 case, but they did not identify this witness as
15 an expert but only as a fact witness. And if
16 they wanted to call this witness as an expert,
17 they should have alerted us and the Court.
18 That is not following the rules of this case.

19 MR. DUMAS: Your Honor, you need not
20 identify your client as an expert witness.

21 Ms. Lund is a representative of my client.
22 And, as a lay person, under the Oregon Rules of
23 Evidence, she's entitled to express an opinion
24 regarding facts and matters within her
25 knowledge and understanding.

1 THE COURT: All right.

2 Counsel, in this situation, under certain
3 accepted situations the Court will allow lay
4 witnesses to give opinion testimony in certain
5 areas. And the weight of the value of that
6 testimony is for the jury to determine. The
7 jury looks at the person's experience and
8 determines does this person have that
9 experience to give an opinion on this?

10 And I think, in this case, she would
11 appear to have that type of experience as a
12 marketing, vice president of marketing for one
13 of the largest corporations in the United
14 States.

15 MR. DUMAS: Thank you, Your Honor.

16 THE COURT: Probably has some experience
17 in marketing issues.

18 MR. WOBROCK: Your Honor, if I could be
19 heard on that? I'm sorry.

20 THE COURT: All right.

21 Let's let the jury step out again. Step
22 out please and take a little break, and we'll
23 be back to you shortly. Thank you.

24 Exercise is good. Exercise is not bad.

25 * * *

1 (Whereupon, the proceedings continued, out
2 of the presence of the jury, as follows:)

3 * * *

4 THE COURT: Well, thank you, counsel, for
5 doing that, because you were talking a little
6 too much before the jury, and it's appropriate
7 to get the jury out if we are going to have
8 that much conversation going on between counsel
9 and the Court.

10 All right. Proceed, counsel.

11 MR. WOBROCK: I have got to say, Your
12 Honor, the defense is really keeping me on my
13 toes, but our agreement was that we would
14 disclose expert witnesses. And that was the
15 Court's order.

16 You will see here on your screen, Your
17 Honor, item two, Mr. Whidby, who is now a
18 current -- excuse me, Mr. Burnley, who is now a
19 current employee. They describe what would be
20 his expert testimony. Cigarette design and
21 manufacturing, process engineering, Philip
22 Morris, Incorporated.

23 Dr. Whidby, who is also a consultant, they
24 described what his testimony would be.

25 Now there's no question that perhaps

1 Ms. Lund may be an expert, qualified to give an
2 expert opinion. But that's not, if you will
3 see here, this is our handwriting, when they
4 disclosed, upon our request, where she was
5 from, they only put down her name. Simply her
6 name. There was no indication whatsoever that
7 this was going to be the subject of expert
8 testimony.

9 Now, I would just say to the Court's
10 comment that lay witnesses may give expert
11 testimony, my understanding of that, Judge, is
12 things like this.

13 THE COURT: No, no, no. You probably
14 misunderstood me. I didn't say that lay
15 witnesses give expert testimony. I said lay
16 witnesses can give opinion testimony if the
17 opinion is in something that they are familiar
18 with, in certain exceptions.

19 MR. WOBROCK: Right.

20 And I think, and I misstated what the
21 Court said there, but I think what I have
22 always understood that to apply, for example,
23 if a lay person is standing on a corner, and a
24 car goes by, they can say I think that is 40
25 miles an hour, that car. I have had experience

1 with driving and cars, and I think that car was
2 going 40 miles an hour.

3 I don't think that that rule has
4 application to this.

5 We have been effectively sandbagged if
6 this Court allows this witness to start giving
7 expert opinions.

8 Sure, she's an employee. But any another
9 employee that has been listed as an expert,
10 such as Mr. Burnley, who is a current employee,
11 they told us he was going to be an expert,
12 right here.

13 This witness, they simply listed her name.
14 It was only after we questioned them where is
15 she from that they even told us where she was
16 from.

17 We thought she might be a neighbor of the
18 Schwarz' family in St. Louis when we started.

19 So, Your Honor, I strongly say that, if
20 she is going to give expert testimony, it is
21 outside the rulings of this Court and it should
22 not be permitted.

23 Just because she is an experienced
24 marketer, if they wanted to offer that, they
25 could have alerted us to that and given us that

1 information. They didn't do it.

2 Now they are trying to come in and have
3 her give opinions that are way outside a fact
4 witness' basis to testify in this case. And
5 that's what she's here for, a fact witness.

6 MR. DUMAS: First and foremost, Your
7 Honor, a lay witness is entitled to give
8 opinions that come within their sphere of
9 knowledge and experience, first and foremost.

10 Second, with regard to this disclosure of
11 expert witnesses, I disagree with Mr. Wobbrock.

12 I'm not going to ask this witness expert
13 opinions and whether she has opinions to a
14 reasonable degree of marketing certainty.

15 Okay.

16 But, frankly, I think I would be entitled
17 to do that.

18 Mr. Wobbrock and I frequently exchange
19 expert witnesses lists on the morning of trial
20 in medical malpractice and products liability
21 cases.

22 He knows that I do not have to list my
23 client, whether it is Dr. Jones or Dr. Smith as
24 an expert witness.

25 I can put my client on the stand, and my

1 client can give an opinion about whether or not
2 he thinks he met the standard of care.

3 Or my client can get on the stand, as an
4 engineer, representing a company, and say I
5 think I designed this widget appropriately, and
6 I'm an engineer.

7 And he knows that. And he's trying to
8 bamboozle the Court, Your Honor.

9 Now, as I said, I think we are having a
10 tempest in a tea pot. I'm not going to ask
11 this witness foundation-type expert-opinion
12 questions. I'm simply going to ask her her
13 opinion, as a person who's employed at Philip
14 Morris, about what they have done. That's all
15 I intend on doing. And I would like to be able
16 to conduct my direct examination, Your Honor.

17 THE COURT: Counsel, your response.

18 MR. TAUMAN: Your Honor, one thing. I
19 know there's a rule against addressing counsel
20 directly. So, I'm going to address this
21 question to you, and maybe you'll address it to
22 Mr. Dumas.

23 That it is true, is it not, Mr. Dumas,
24 through the Court, that Mr. Dumas and I
25 exchanged an e-mail discussion about what the

1 required disclosures were for expert witnesses,
2 that we exchanged e-mails, and we agreed upon
3 it?

4 And, in fact, there was some
5 misunderstanding about it, whether lay
6 witnesses had to, you had to disclose the
7 location of those witnesses.

8 And Mr. Dumas eventually agreed that that
9 was part of our agreement, that lay witnesses
10 have to have their location disclosed.

11 And that's why you saw the handwriting on
12 that, that paper.

13 All I'm saying is that, if Mr. Dumas is
14 harking back to other cases that Mr. Wobbrock
15 and he had, it is totally out of the picture
16 here.

17 According to the case management order,
18 and according to Mr. Dumas' and my very
19 specific written agreement, expert witnesses
20 would be identified by the topic, by the degree
21 that they held, by their specialty and by their
22 location.

23 And this was not done with this particular
24 witness.

25 MR. DUMAS: Mr. Tauman's representation

1 regarding our communications is 100 percent
2 accurate, Your Honor. I'm not going to be
3 asking this witness expert opinion questions.

4 MR. WOBROCK: Well, then, Judge, the
5 opinions are irrelevant. You know, it is a
6 subject of expert opinion, marketing. You
7 can't just ask her opinions without any
8 foundation, without anything.

9 By the way, as some effort to "bamboozle"
10 the Court, I can assure the Court I haven't
11 heard that word for awhile. I kind of like it.

12 MR. DUMAS: It's a good word.

13 MR. WOBROCK: But I can assure the
14 Court --

15 MR. TAUMAN: That you're going to hear it
16 again.

17 MR. WOBROCK: -- that in malpractice
18 cases we never disclose the subject or the
19 foundation or the background of the witnesses.
20 We simply identify doctors so that somebody on
21 the jury who has a physician-patient
22 relationship doesn't end up calling for a
23 mistrial. That's what we do.

24 That issue has nothing to do with the
25 Court's prior management order in this case,

1 which is exactly as Mr. Tauman has described,
2 their obligation to tell us.

3 Now, they hired somebody from the company,
4 which -- why didn't this apply to Mr. Burnley?
5 Mr. Burnley, they told us what he was going to
6 talk about, process engineering, chemical
7 engineering. That sort of thing. He worked
8 for the company.

9 If that was the case, why did they have to
10 tell us in Mr. Burnley's case?

11 They are trying to go beyond what this
12 Court has ordered, which is, if she's a lay
13 witness, she gives facts. And that's what
14 she's here for, facts.

15 And I'm sure she's got abundant facts.
16 She's been inside that corporation for 17
17 years. She doesn't need to go beyond facts and
18 start giving us opinions.

19 MR. DUMAS: Your Honor, she's my client.
20 She's entitled to give her opinion about what
21 she did, why she did it, and the effect of what
22 she did or didn't do. And if I can't do that,
23 Your Honor, I can't defend my client.

24 THE COURT: All right.

25 I thank counsel very much. We are taking

1 the morning break right now. And the Court
2 will look at Oregon Evidence Rule 701.

3 Thank you. Court is out of session.

4 The witness may step down.

5 And let the jury know that we are taking
6 our morning break.

7 * * *

8 (Whereupon, a recess took place, and Vol. 37-A

9 concluded. Vol. 37-B was reported by

10 Katie Bradford.)

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1 STATE OF OREGON)
2 County of Multnomah)
3
4) SS.

5 I, Jennifer Wiles, hereby certify that I
6 am an Official Court Reporter to the Circuit
7 Court of the State of Oregon for Multnomah
8 County; that I reported in Stenotype the
9 foregoing proceedings and subsequently
10 transcribed my said shorthand notes into the
11 typewritten transcript, pages 1 through 69,
12 both inclusive; that the said transcript
13 constitutes a full, true and accurate record of
14 the proceedings, as requested, to the best of
my knowledge, ability and belief.

15 Dated this 22nd day of August, 2002 at
16 Portland, Oregon.

17
18
19

20 Jennifer Wiles
21 Official Court Reporter
22
23
24
25

